

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ELAINE CAMPOS

Claimant

VS.

WESTERN PLAINS REGIONAL HOSPITAL

Respondent

AND

ALEXSIS, INC.

Insurance Carrier

Docket No. 205,604

ORDER

Claimant and respondent both appeal from an Award dated September 21, 1999. The Appeals Board heard oral argument January 18, 2000.

APPEARANCES

Brian D. Pistotnik of Wichita, Kansas, appeared on behalf of claimant. Terry J. Malone of Dodge City, Kansas, appeared on behalf of respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The sole issue on appeal is the nature and extent of claimant's disability. The Administrative Law Judge limited the disability to functional impairment because claimant was terminated from employment with respondent for failing to provide evidence her nursing license had been maintained while she worked for respondent. Claimant contends she should receive a work disability or, in the alternative, a higher functional impairment. According to claimant, she should receive work disability because: (1) respondent knew claimant did not have a license and was equally at fault, and (2) claimant had renewed her license at the time she was terminated. If the award is limited to functional impairment, claimant argues the rating relied on by the Administrative Law Judge, a rating by Dr. Daniel D. Zimmerman, does not

include claimant's neurogenic bladder or facial nerve lesion, conditions that also resulted from the injury at work.

Respondent, on the other hand, contends the award should be based on a lower functional impairment. Respondent asserts the Administrative Law Judge should not have relied exclusively on the opinion of Dr. Zimmerman and should have given some weight to the opinions of Dr. Philip R. Mills and Dr. Pedro A. Murati.

The appropriate number of weeks of temporary total disability benefits was initially also an issue on appeal but the parties have reached an agreement on this issue as described below.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board finds the Award should be modified to 36 percent disability.

Findings of Fact

1. Claimant was injured on June 12, 1995, while helping a patient off the floor. As the claimant was assisting the patient, the patient slumped and claimant's back popped. Claimant notified respondent the next morning, and respondent authorized medical treatment. Claimant initially received conservative treatment and continued to work with restrictions until a second incident on August 28, 1995. On that date, claimant reinjured her back while moving a patient to a wheelchair. In addition to low back symptoms, claimant had problems with bladder control after the low back injury.
2. After the August 28, 1995 incident, claimant was referred first to Dr. Alexander Neel. Dr. Neel suggested surgery and referred claimant first to Dr. Guillermo Garcia, then Dr. Stein, and finally Dr. Eustaquio O. Abay, II. On September 4, 1996, Dr. Abay performed L4-5-S1 decompressive laminectomy with bilateral L4-5 foraminotomy.
3. Claimant woke from the surgery with one side of her face numb and with her right arm numb.
4. After the surgery, claimant was referred to Dr. Murati, a physical medicine specialist. Dr. Murati was designated to treat claimant for the back, right arm, face, and neurogenic bladder. Dr. Murati first saw claimant November 5, 1996. Dr. Murati opined that all of these conditions—the back, bladder, right arm, and face injuries—arose directly or indirectly from the initial injury. The face and arm problems arose from positioning during surgery. The bladder condition arose from stenosis that formed. Dr. Murati continued to treat claimant through March 18, 1997, and then released claimant after a functional capacity evaluation.
5. After she was released by Dr. Murati, claimant received additional treatment for her right arm. She was eventually referred back to Dr. Abay and Dr. Abay performed ulnar nerve

transposition surgery in the fall of 1997. The surgery relieved the numbness in the right arm but claimant continued to have a cold sensation and weakness.

6. Claimant was first licensed as an RN in 1993. Claimant was required to renew the license in May 1995. She had moved and did not receive the application for renewal. The lapse in claimant's license came to respondent's attention and, as of September 13, 1995, respondent terminated claimant. Respondent had first asked for evidence of license renewal several months before the termination. The termination was for failing to provide evidence of continuous licensing. Claimant had obtained a temporary license the day before she was terminated. Although claimant told Ms. Jackie Penner she would go to Topeka if necessary and would come to work only if she had the license, claimant did not advise Ms. Penner of the temporary license at the time Ms. Penner terminated claimant. At the time she was terminated, claimant had actually obtained a temporary license but the evidence indicated claimant did practice without renewing her license for a period of several months before she was terminated. The termination paperwork states claimant was terminated for failing to provide the license, but Ms. Penner testified claimant would have had to provide a license showing that she had been continuously licensed to avoid the termination. The Board finds claimant was terminated for failing to provide evidence she was continuously licensed while working for respondent.

7. Three physicians testified to the nature and extent of claimant's disability. Dr. Murati, Dr. Zimmerman, and Dr. Mills. Dr. Murati initially rated claimant's impairment using the Fourth Edition of the *AMA Guides to the Evaluation of Permanent Impairment*. When asked to give a rating based on the Third Edition (Revised), as required at the time of claimant's accident, Dr. Murati noted he did not do the range of motion testing necessary to rate the back condition under the Third Edition (Revised). He rated the neurogenic bladder using the Third Edition (Revised) as 10 percent of the whole person, the facial nerve problem as 5 percent of the whole person, and ulnar cubital syndrome as 6 percent of the whole person. The back condition would be 11 percent plus a percentage for loss of range of motion. Dr. Murati combined these four ratings—10 percent for the bladder, 5 percent for the facial nerve, 6 percent for the right arm, and 11 percent for the back—using the combined value chart from the *AMA Guides* to arrive at a rating of 29 percent of the whole person.

8. Dr. Mills performed an independent medical examination at the request of the Administrative Law Judge. Based on records from Dr. Abay, Dr. Mills also considered the ulnar nerve problem and facial numbness to be a consequence of the position claimant was in during surgery for the back. Dr. Mills rated the back impairment as 15 percent of the whole person using the Fourth Edition of the *AMA Guides*. At the deposition, he indicated the rating would be 10 to 12 percent under the Third Edition (Revised). He testified he would not use a range of motion rating for claimant. He did not believe a valid range of motion testing could be done because of her weight. Dr. Mills rated the right upper extremity impairment as 6 percent of the whole person under the Fourth Edition of the *AMA Guides*. Dr. Mills did not rate the facial numbness or neurogenic bladder.

9. Dr. Zimmerman performed an evaluation at the request of claimant's counsel. He rated the impairment using the *AMA Guides*, Third Edition (Revised). He rated the back injury as

26 percent of the whole person. In his deposition testimony, Dr. Zimmerman breaks this rating into components consisting of separate percentages for three levels of stenosis, nerve entrapment, weakness in both lower extremities, and loss of range of motion. Respondent contends Dr. Zimmerman made an error in adding these and used 9 percent for loss of range of motion when he meant 4 percent, with a resulting total less than 26 percent. But from our review, the Board concludes Dr. Zimmerman intended 9 percent for the loss of range of motion and a total of 26 percent. Dr. Zimmerman consistently states a total for the back of 26 percent. He states 26 percent in his report and in his deposition. At one point in his deposition he states 4 percent for loss of range of motion and later 9 percent. It appears the 9 percent was the correct percentage based on the range of motion and appears this was what Dr. Zimmerman intended. As a result, the total rating by Dr. Zimmerman is considered to be 26 percent for the back.

Dr. Zimmerman rated the right arm impairment as 12 percent of the whole person. He combined these under the *AMA Guides* to arrive at a total whole person impairment of 35 percent. He did not rate the bladder or facial conditions.

10. Based on the testimony of claimant, Dr. Mills, and Dr. Murati, the Board finds claimant's facial numbness and right ulnar nerve syndrome were a direct consequence of claimant's placement during the back surgery. The neurogenic bladder resulted from the initial back injury.

11. The parties have stipulated that respondent paid temporary total disability benefits from February 14, 1996, to January 26, 1997, and from October 23, 1997, to February 8, 1998, for a total of 64.28 weeks at the rate of \$326. The maximum weekly benefit for the date of accident in this case was \$319 so respondent had overpaid temporary total disability benefits by \$449.96.

Conclusions of Law

12. Claimant has the burden of proving his/her right to an award of compensation and of proving the various conditions on which that right depends. K.S.A. 44-501(a).

13. Disability is measured by functional impairment for employees who return to work at a wage that is 90 percent or more of the wage the employee was earning at the time of the injury. If the employee is not earning 90 percent of the preinjury wage, a higher work disability may be awarded.

14. Functional impairment is the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the *AMA Guides to the Evaluation of Permanent Impairment*. At the time of claimant's injury, the Act required that functional impairment be based on the Third Edition (Revised). K.S.A. 44-510e.

15. K.S.A. 44-510e(a) defines work disability as the average of the wage loss and task loss:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.

16. In this case, claimant was terminated from her employment because she did not provide evidence she was continuously licensed. Based on *Ramirez v. Excel Corporation*, 26 Kan. App. 2d 139, 979 P.2d 1261, rev. denied ___ Kan. ___ (1999), the Board concludes claimant should be limited to disability based on functional impairment. The Court of Appeals in *Ramirez* held that a claimant terminated for giving false information on an employment application should have the wage in that employment imputed when measuring work disability. The Board considers this case to be analogous. Claimant was responsible for renewing her license and failed to do so. There is nothing in the record, other than the timing of the termination, to indicate the termination was because of claimant's injury or her workers compensation claim. Under these circumstances, the Board concludes the decision by the ALJ to limit the award to functional impairment should be affirmed.

17. The Board finds claimant has a 5 percent general body impairment for the facial nerve injury and 10 percent for the neurogenic bladder based on the ratings by Dr. Murati, the only physician to give a rating for these conditions.

18. The Board finds claimant has a 9 percent whole body impairment for injury to the right arm. This conclusion considers the rating by Dr. Zimmerman of 12 percent as well as the 6 percent rating by Dr. Murati. These were ratings given based on the Third Edition (Revised) of the *AMA Guides*.

19. The Board finds claimant has an 18 percent whole body impairment for injury to the back. For the injury to the back, the Board has considered the rating by Dr. Zimmerman of 26 percent. The Board has also given weight to the opinion of Dr. Mills that claimant has only a 10 to 12 percent impairment based on the Third Edition (Revised) of the *AMA Guides*. Claimant has argued that only Dr. Zimmerman's rating was based on the Third Edition (Revised). Dr. Murati and Dr. Mills originally gave ratings based on the Fourth Edition, an edition not applicable until April 4, 1996. Both were then asked at their depositions to give ratings based on the Third Edition (Revised). Dr. Murati rated the back at at least 11 percent but indicated he did not do range of motion and could not, for that reason, add for loss of range of motion as the Third Edition (Revised) asks you to do. Dr. Mills, on the other hand, stated he would give a rating of 10 to 12 percent based on the Third Edition (Revised) and would not add for loss of range of motion because, in his opinion, a range of motion test would not be valid in claimant's case. He added that she would have had abnormal range of motion before this incident. As we view Dr. Mills' rating, he is giving a rating for the back injury based on the Third Edition (Revised).

20. Using the combined values chart from the *AMA Guides*, Third Edition (Revised), the Board concludes claimant's total impairment is 36 percent. This combines 18 percent for the back injury, 10 percent for the bladder impairment, 5 percent for the facial nerve impairment, and 9 percent for the right upper extremity impairment.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Pamela J. Fuller on September 21, 1999, should be, and the same is hereby, modified.

WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Elaine Campos, and against the respondent, Western Plains Regional Hospital, and its insurance carrier, Alexis, Inc., for an accidental injury which occurred June 12, 1995, and based upon an average weekly wage of \$677.20, for 64.28 weeks of temporary total disability compensation at the rate of \$319 per week or \$20,505.32, followed by 131.66 weeks at the rate of \$319 per week or \$41,999.54, for a 36% permanent partial disability, making a total award of \$62,504.86, all of which is presently due and owing in one lump sum less amounts previously paid.

The Appeals Board also approves and adopts all other orders entered by the Award not inconsistent herewith.

IT IS SO ORDERED.

Dated this ____ day of February 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Brian D. Pistotnik, Wichita, KS
Terry J. Malone, Dodge City, KS
Pamela J. Fuller, Administrative Law Judge
Philip S. Harness, Director